THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 96-0012

ISSUES: (1) What are the ethical obligations of an insurance defense attorney when the insured requests access to the attorney's file, including communications between the attorney and the insurer to which the insured was not privy?

(2) May the attorney return the original file materials to insured?

DIGEST: (1) Under California law, when an attorney, who is not *Cumis* counsel, is retained by an insurer under a reservation of rights to defend an insured from a third-party claim, the insured and insurer are joint clients of the attorney. Joint clients generally have no expectation of confidentiality between themselves concerning the matter on which they are joint clients. Any communication between the insurer and the retained attorney concerning the defense of insured's claim is a matter of common interest to both insured and insurer. Regardless of whether she was privy to such communications, the insured has a right to them. Consequently, the retained attorney must allow the insured to inspect and copy the file.

(2) Each joint client usually has an equal right to the attorney's original file. The attorney would deny one joint client this equal right by releasing the original file to the other joint client, so the attorney normally may not release the original file to one joint client without the consent of the other clients. However, the attorney should return on request to each respective client papers and property belonging to that client which the client provided to the attorney during the representation.

AUTHORITIES INTERPRETED: Rule 3-700 of the Rules of Professional Conduct of the State Bar of California.

Evidence Code section 962.

STATEMENT OF FACTS

The defendant ("Insured") in a personal injury lawsuit tenders the defense of the case to his insurer ("Insurer"). Insurer accepts the tender, subject to a reservation of its right to withdraw the defense and deny indemnity if the insurer determines that the lawsuit is outside the scope of the policy. Insurer engages an attorney ("retained counsel") to represent the Insured. With Insurer's consent, Insured hires a second attorney ("*Cumis* counsel") to act as Insured's independent counsel pursuant to Civil Code section 2860.

Retained counsel represents Insured in the litigation as counsel of record.[1/] Retained counsel does not advise either Insurer or Insured about coverage. *Cumis* counsel works with retained counsel to ensure that retained counsel acts in Insured's best interests. During settlement talks, Insurer asks Insured to contribute to the settlement an amount greater than the deductible that is specified in the applicable insurance policy. After Insured agrees to Insurer's request, Insured and Insurer agree to settle the personal injury case for an amount within policy limits. Upon completing the settlement agreement, retained counsel terminates her representation of Insured and Insurer in this matter.

[1/] In California State Bar Formal Opinion Interim Number 96-0012(B), we conclude that retained counsel is not required to withdraw merely because the insurer is obliged to appoint independent or *Cumis* counsel for the insured.

Insured contemplates a bad faith lawsuit against Insurer. Insured requests retained counsel's entire file concerning her work in defending the personal injury action.

We are asked to address two questions: (1) whether retained counsel's duty of confidentiality to Insurer under section 6068, subdivision (e) of the Business and Professions Code precludes her from permitting Insured to review the entire file, including communications between retained counsel and Insurer to which Insured was not privy; and (2) what obligation does retained counsel have to turn over original file materials to Insured under Rule 3-700(D)(1) of the Rules of Professional Conduct of the State Bar of California.[2/]

DISCUSSION

I. May Retained Counsel Permit the Insured to Inspect the Entire File?

To analyze whether retained counsel owes a duty to Insurer to withhold portions of the file from Insured, we begin by noting that Insurer and Insured were retained counsel's joint clients, under the "tripartite relationship" doctrine recognized in California law. (See, e.g., *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 127 [93 Cal.Rptr.2d 534]; *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1428-1429 [86 Cal.Rptr.2d 20].)

Insured's right to inspect the file requires consideration of Evidence Code section 962, which sets forth the joint-client exception to the attorney-client privilege as follows:

> Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to communication made of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).

If Insured were to sue Insurer for bad faith in handling defense of the claim against Insured, then Evidence Code section 962 would permit Insured to discover *all* communications between Insurer and retained counsel concerning defense of the claim against Insured. *(Glacier General Assurance Co. v. Superior Court* (1979) 95 Cal.App.3d 836 [157 Cal.Rptr. 435] (applying Evidence Code section 962 to bad faith lawsuit). *Glacier*'s application of the joint-client exception in a civil suit between joint clients is consistent with a number of other cases. E.g., *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 567 [237 Cal.Rptr. 528]; *Wortham & Van Lew v. Superior Court* (1987) 188 Cal.App.3d 927, 932 [233 Cal.Rptr. 725, 728]; *De Olazabal v. Mix* (1937) 24 Cal.App.2d 258, 262 [74 P.2d 787]; *Croce v. Superior Court* (1937) 21 Cal.App.2d 18, 20 [68 P.2d 369].)[3/]

Evidence Code section 962, however, does not apply to the situation presented for two reasons. First, no civil proceeding between the joint clients is currently pending. Thus, Evidence Code section 962 is not applicable by its own terms. Second, retained counsel has not been called to testify by subpoena or otherwise placed under legal compulsion to reveal information. Hence, the evidentiary privilege does not govern retained counsel's response actions. Rather, the ethical

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[2/] All rule references are to the Rules of Professional Conduct of the State Bar of California.

[3/] One Court of Appeal decision, *Glade v. Superior Court* (1978) 76 Cal.App.3d 738, 747 [143 Cal.Rptr. 119], suggests in *dicta*, contrary to the authorities above, that the joint-client exception does not apply "as to communications made in confidence to the attorney by one of the joint clients at a time when the other client was not present." (Citation omitted.) The court in *Glade* held only that Evidence Code section 962 did not apply because the joint clients were not parties to that civil proceeding. *Ibid.*

duty of confidentiality governs retained counsel's response to Insured's request. The issue, then, is whether retained counsel's duty of confidentiality to Insurer requires her to refrain from providing some or all of the file to Insured.

While exceptions to attorney-client privilege do not always apply to the ethical duty of confidentiality set forth in section 6068, subdivision (e) of the Business and Professions Code, we believe that the joint-client exception to confidentiality reflects a general principle that attorneys representing joint clients generally may not keep secrets from the clients about the matter on which the lawyer represents them jointly. To the contrary, a lawyer who represents multiple clients in a matter is obligated to disclose significant developments in the matter to each client. (Rule 3-500; Bus. & Prof. Code, § 6068, subd. (m).) Were a lawyer representing multiple clients in the same matter to be prevented by a duty of confidentiality to one joint client from reporting a significant development in the matter to another joint client, then the lawyer would be unable to comply with his or her duties and would be required to withdraw. (Rule 3-700(B)(2).) Further, a lawyer who preferred one client over another joint client would violate the lawyer's duty of undivided loyalty to each client. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 288-89 [36 Cal.Rptr.2d 537].)

Thus, we conclude that when a lawyer represents multiple clients in the same matter, each client usually is entitled to review information in the client file that any one of the clients is entitled to receive. Applied to our facts, absent a special circumstance, retained counsel should honor Insured's request to examine the entire file, subject to retained counsel's right to assert the work product doctrine. (See, e.g., *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264 [218 Cal.Rptr. 205].)

We qualify our conclusion with the word "usually," because it is possible in certain situations for one joint client to claim to have provided information in confidence to an attorney with the expectation that such information would remain confidential from the other joint clients. This could happen if, for instance, the attorney did not apprise the joint clients of the joint client exception to the privilege at the outset of the relationship. (See rule 3-310(C)(1), Discussion section [operation of section 962 is a potential conflict which should be disclosed to joint clients].) Some cases have held that the joint-client exception does not control when a lawyer takes on a joint representation without obtaining informed consent of the joint clients to conflicts. (See, e.g., *Industrial Indemnity Co. v. Great American Ins. Co.* (1977) 73 Cal.App.3d 529, 537-38 [140 Cal.Rptr. 806] (joint-client exception does not apply where attorney undertook or continued joint representation without disclosing conflicting interests and obtaining written consent).) If retained counsel is unsure whether permitting Insured to review the file will violate retained counsel's duty of confidentiality to Insurer, then retained counsel should decline to permit Insured to review the portions of the file over which retained counsel believes Insurer might be able to assert confidentiality.

We distinguish our conclusion in this opinion from our prior California State Bar Formal Opinion Number 1995-139, where we concluded that under the facts presented, an insurance defense lawyer was obligated to withhold information from the insurer. That opinion's discussion of confidentiality must be read narrowly based on the particular facts we considered there. California State Bar Formal Opinion Number Number 1995-139 addressed two questions: (1) what is a retained counsel's duty when he or she discovers information calling into question whether the insured has insurance coverage for the claim, even though the insurer has already conceded coverage; and (2) what is retained counsel's duty upon discovering that the insured has perpetrated fraud to obtain coverage of the claim being defended? We concluded that an insurance defense lawyer who learns of information calling coverage into question may not disclose that information to the Insurer. We noted that the attorney might be required to withdraw if the client refused to rectify the fraud, because the attorney's duty of confidentiality to the Insured conflicted with the attorney's duty to report a significant development in the matter (*i.e.*, the Insured's fraud in procuring coverage) to the Insurer. (Rule 3-500; Bus. & Prof. Code, § 6068, subd. (m).)

The present facts are quite different from those in California State Bar Formal Opinion Number 1995-139 in two important ways. First, California State Bar Formal Opinion Number 1995-139's analysis relied on the concept that the insured is the "primary" client in the tripartite relationship. As a result, we concluded that the insurance defense lawyer must avoid disclosing information to the Insurer that could jeopardize coverage. Nothing in California State Bar Formal Opinion Number 1995-139 suggests that retained counsel should refrain from providing information *to the Insured*.

Second, unlike the situation we addressed in California State Bar Formal Opinion Number 1995-139, the insurer in the present fact pattern reserved its rights to contest coverage. In California State Bar Formal Opinion Number 1995-139, by contrast, the carrier had conceded coverage but defense counsel subsequently learned information that might provide the carrier with a basis to reconsider that decision. Here, it is no secret to either party that Insurer and Insured disagreed on coverage, due to Insurer's reservation of rights. Retained counsel's role was limited to defending the third-party claim, a matter of common interest to Insured and Insurer, and should not have involved resolution of the coverage dispute on behalf of either the Insured or the Insurer. Consequently, there should not be information in the file confidential to Insurer that would warrant retained counsel withholding the information from Insured. (Compare *Aetna Casualty & Surety Co. v. Superior Court* (1984) 153 Cal.App.3d 467 [200 Cal.Rptr. 471] (consultations between insurer and lawyer *before* the insurer conceded its obligation to defend insured were protected by the attorney-client privilege as against the insured) and *Houston General Insurance Co. v. Superior Court* (1980) 108 Cal.App.3d 958, 966-67 [166 Cal.Rptr. 904] (attorney's consultation with carrier concerning coverage protected by attorney-client privilege where there was no evidence that lawyer was ever retained to defend the insured) with *Glacier General Assurance Co. v. Superior Court*, *supra*, 95 Cal.App.3d 836, 842 (when insurer employs counsel to defend its insured, "any communication with the lawyer concerning the handling of the claim against the insured is necessarily a matter of common interest to both the insurer and the insured").

II. Does the Insured Have a Right to the Original File?

Ordinarily a client is entitled to receive, upon request, the client's entire original file from the attorney upon termination of the attorney's employment in a matter. (See Rule 3-700(D)(1).) The attorney is permitted to retain a copy at the attorney's expense. (Rule 3-700(D), Discussion section.) Here, however, it is physically impossible for each client to receive the original file, because only one of them can possess that original file at any given time. If retained counsel were to give Insured the file, then retained counsel would impair Insurer's equal right to the original file. Thus, absent consent by both clients, retained counsel cannot give the original file to one of her two clients. *(See* Cal. State Bar Formal Opn. No. 1995-153 [inconsistent demands for the original file is one of the potential conflicts in a joint representation] and Los Angeles County Bar Association Opinion Number 493 (1998) [explaining the basic rule and discussing alternatives for further action that might be available to the attorney when the joint clients do not agree on the disposition of the original file].)

Retained counsel must preserve the right of both Insured and Insurer to the original file while also respecting the rights of both joint clients to review information in the file. To achieve those ends, retained counsel should permit Insured to inspect the original file at retained counsel's office (subject to the potential limitation discussed below) and allow Insured to copy the file as Insured desires.[4/]

An exception to this general rule would arise if the attorney possessed papers or property belonging to the Insured that the Insured had provided to retained counsel during the representation. Retained counsel should return such papers or property to the Insured. (Rule 3-700(D)(1).) The Insurer likewise could request that retained counsel return papers or property Insurer had provided to retained counsel.

[4/] When a former client takes possession of the original file, the attorney is permitted to keep a copy if the attorney pays for the copying. (Rule 3-700(D) (Discussion section).) Here, the attorney has no need to copy the file because he may not release it to Insured unless Insurer agrees.

CONCLUSION

In responding to Insured's request for the file, retained counsel should proceed under the rules applicable to joint representations. Because there was a reservation of rights, retained counsel's role was limited to defending the third-party claim, a matter of common interest to Insured and Insurer, and retained counsel should allow Insured to review and copy retained counsel's entire file. However, retained counsel should return any papers or property either the Insured or Insurer provided to retained counsel during the representation.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.